UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLADYS DAMPIER, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C06-1188-RSM REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Gladys Dampier proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for an award of benefits.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1956.[1] She completed the eighth grade of school, attending special education classes. Plaintiff previously worked as a nurse's aid and hotel housekeeper.

Following an application filed in 1993, plaintiff received SSI benefits based on drug addiction and/or alcoholism. (*See* AR 14.) Those payments ceased at some point and plaintiff filed another application for SSI benefits in 2000, alleging disability beginning in June of that year. (*Id.*) That application was denied initially and on reconsideration. Following a hearing, ALJ Edward P. Nichols issued an unfavorable decision in 2002. (AR 25-32.)

Plaintiff filed a third application for SSI benefits in November 2002, alleging disability beginning January 1, 1999. (AR 58-61.) She based this application on her major depressive disorder; migraines; chronic sinusitis; intermittent explosive disorder; borderline intellectual functioning; illiteracy; polysubstance dependence in full sustained remission; hepatitis C; cirrhosis of the liver; arthritis; high blood pressure; and stomach, back, and heart problems. (AR 58.) This application was also denied initially and on reconsideration, and plaintiff timely requested a hearing.

ALJ Verrell Dethloff held a hearing on October 7, 2005, taking testimony from plaintiff and her case manager, Eileen Laiche. (AR 431-65.) He issued a decision unfavorable to plaintiff on January 19, 2006. (AR 14-21.) Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on June 22, 2006, making the ALJ's decision the final decision of the

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[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

Commissioner. (AR 6-9.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since her alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's depressive disorder, cervical disc disease, borderline intelligence, hepatitis C, and status post herniorrhaphy severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found her able to perform her past relevant work as a maid-housekeeper. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a

whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in failing to find her disabled at step three, in ignoring the evidence of her pain, and in failing to provide a complete transcript of the record. She requests remand for an award of benefits or, alternatively, for further administrative proceedings. Defendant concedes error, but argues that this matter should be remanded for further administrative proceedings.

The Court has discretion to remand for further proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

> Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77. For the reasons described below, the undersigned concludes that this matter should be remanded for an award of benefits.

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Step Three

At step three, the ALJ must consider whether the claimant's impairments meet or equal one of the impairments in the "Listing of Impairments" set forth in Appendix 1 to 20 C.F.R. Part 404, Subpart P. Plaintiff bears the burden of proving the existence of impairments meeting or equaling a listing. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

Plaintiff argues that the ALJ erred in failing to find her borderline intelligence/mental retardation disabling pursuant to listing 12.05C. *See* 20 C.F.R. Part 404, Subpart P, App. 1, § 12.05C. Listing 12.05 describes mental retardation as "refer[ring] to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22." *Id*. To satisfy part C of this listing, a claimant must have "[a] valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function[.]" *Id*. *Accord Markle v. Barnhart*, 324 F.3d 182, 187 (3d Cir. 2003) ("To meet the requirements of § 12.05C a claimant must i) have a valid verbal, performance or full scale IQ of 60 through 70, ii) have a physical or other mental impairment imposing additional and significant work-related limitations of function, and iii) show that the mental retardation was initially manifested during the developmental period (before age 22).")

ALJ Dethloff did not specifically address listing 12.05C. Instead, he concluded: "Although the claimant has depression and borderline intellect, these impairments cause only moderate difficulties in her maintaining social functioning and does not establish the presence of the "C" criteria of the Listings." (AR 16.) However, ALJ Nichols did specifically address listing

12.05C and ALJ Dethloff fully incorporated into his decision the 2002 decision of ALJ Nichols. (*See* AR 15, 20.)

In discussing listing 12.05C, ALJ Nichols found as follows:

> A psychological assessment conducted by James D. Czysz, Psy.D. on February 6, 2002 included WAIS-III testing which produced IQ scores in the mid-60's. Accordingly, given the claimant's history of borderline intellectual functioning, consideration was given to section 12.05C. Yet, there are several evidentiary circumstances which mitigate against listing level severity in this regard. When tested by Dr. Winters in December 1997, the claimant achieved a valid WAIS-R verbal IQ score of 72, a performance IQ of 82, and a full-scale IQ of [stet] in the mid-70's. This is consistent with her self-reported and demonstrated functional abilities, and will be given more weight that [stet] the conducted by Dr. Czysz. Although there is no confirmation that the testing of Dr. Czysz was influenced by intentional poor effort, the scores produced are simply incompatible with the claimant's history of higher functioning. Moreover, the claimant was able to work with this limitation for years as both a motel maid and nurse's aide. I note that, in order to meet the first requirement of Section 12.05C, an individual must have significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the development period prior to age 22. Given her demonstrated functional ability, the claimant does not meet this standard.

(AR 26-27 (internal citations to record omitted.)) He later described plaintiff's "reported and demonstrated functional ability[]" as including, for example, her ability "to utilize public transportation; take her daughter on trips to the zoo; visit with her mother and prepare her own meals[,]" and "to do her own cleaning and grocery shopping, as well as maintain her own finances." (AR 29 (internal citations to record omitted.)) (*See also* AR 19 (ALJ Dethloff also described plaintiff's activities and abilities: "For instance, the claimant perform [stet] household chores; self-groom; prepare meals; attend church and narcotics anonymous meetings; take public transportation; socialize appropriately with the manager of her apartment complex; listen to the radio; and watch television."; "Although the claimant alleges that she cannot read or write, she demonstrated that she could perform basic arithmetic to the extent that she could pay rent, manage

her money, and purchase food. Additionally, the claimant was able to follow a three-step command upon examination and request help in completing necessary paperwork for enrollment in drug and alcohol treatment.”))

Plaintiff raises several arguments in relation to the first prong of listing 12.05C. First, while acknowledging that IQ scores inconsistent with a claimant’s activities and demonstrated abilities may be rejected, plaintiff asserts that, in this case, the ALJ erred in finding her 2002 IQ scores incompatible with her history of functioning. For example, in a third circuit case, the court found a claimant’s activities, including his “ability to pay his own bills, add and subtract, use an ATM machine and to take care of all his own personal needs; [his] ability to identify and administer his medication; his previous jobs; his obtaining a GED; and the positive evaluations of [his] psychologist[,]” not inconsistent with qualifying mental retardation and not providing a valid a basis for rejecting an IQ score of 70. *Markle*, 324 F.3d at 186-87. *See also Brown v. Secretary of Health & Human Servs.*, 948 F.2d 268, 270 (6th Cir. 1991) (finding facts including that “Mr. Brown is able to use public transit; he has a driver's license; he visits friends; he is able to make change at a grocery store; he can do his own laundry and clean his room; he completed the sixth grade; he has a limited level of reading comprehension . . . ; and as a truck driver, Mr. Brown recorded mileage, the hours he worked, and the places he drove[,]” not inconsistent with a valid IQ score of 68 and concluding that substantial evidence did not support the rejection of that score). Plaintiff also rejects the ALJ’s reliance on her past ability to work, noting she had reported income in only eight of the past thirty-one years, with annual income of over $1,000.00 in only three of those years. (AR 71.)

Second, plaintiff maintains that the ALJ erred in failing to adopt the lower score of two

separate IQ tests. She concedes that, while social security regulations provide for use of the lowest IQ score of several produced in a single test, 20 C.F.R. § 404, Subpt. P, App. 1, 12.00(D), they "do not specify . . . which score the ALJ should disregard when there are differing scores from two apparently valid IQ tests[,]" *Muncy v. Apfel*, 247 F.3d 728, 733 (8th Cir. 2001). However, plaintiff points to case law providing support for the adoption of the lower score of two separate tests. *See Fanning v. Bowen*, 827 F.2d 631, 633 (9th Cir. 1987) ("The ALJ found that Fanning's IQ scores obtained during psychological testing by two clinical psychologists ranged from a high of 76 to a low of 69, thereby satisfying the first prong of section 12.05(C)."") (internal footnote omitted); *Ray v. Chater*, 934 F. Supp. 347, 350 (N.D. Cal. 1996) (inferring, based on the regulation relating to multiple IQ scores on a single test, "that when multiple I.Q. scores are available the Regulations prefer the lowest score; finding, with IQ scores of 67 and 72, plaintiff met the first prong of listing 12.05D, which also requires a full scale IQ of 60 through 70). *See also Muncy*, 247 F. 3d at 734 (remanding where ALJ found higher IQ score a result of medical improvement, but cited no other evidence supporting a dramatic improvement in intellectual or adaptive functioning; directing ALJ on remand to enter specific findings detailing why first, lower IQ score should not be adopted as the controlling score). Plaintiff requests that this Court adopt the logical inference that, where the lowest recorded score in a single examination is controlling, the lowest recorded score as between two separate tests should also control. Alternatively, plaintiff requests that the Court remand for further development of this issue.

Third, plaintiff notes that ALJ Nichols failed to mention the results of an April 2001 examination in which Dr. Czysz rendered an estimated IQ of 64. (AR 157.) She maintains that the results of this examination are indicative of her IQ or at least strongly corroborative of the

2002 results. Plaintiff asserts that this error at least necessitates remand for further analysis as to the validity of the two IQ scores in the mid-to-low sixties.

Plaintiff next asserts her satisfaction of the preliminary criteria for listing 12.05. She avers that her IQ score of 62 establishes her "significantly subaverage general intellectual functioning[,]" while her eight plus years in special education establishes her "deficits in adaptive functioning initially manifested during the developmental period; i.e., . . . before age 22." 20 C.F.R. Part 404, Subpart P, App. 1, § 12.05(C). Plaintiff also proffers support for the rebuttable presumption that IQ remains fairly stable throughout life absent evidence of injury or change in intellectual functioning. *See Hodges v. Barnhart*, 276 F.3d 1265, 1269 (11th Cir. 2001) (finding ALJ erred in failing to presume from evidence related to condition after age twenty-two that claimant manifested a mental disability prior to age twenty-two; directing ALJ on remand to presume mental impairment before age twenty-two and allowing Commissioner opportunity to present evidence that claimant's daily activities rebutted presumption); *Muncy*, 247 F.3d at 734 ("Mental retardation is not normally a condition that improves as an affected person ages. . . . Rather, a person's IQ is presumed to remain stable over time in the absence of any evidence of a change in a claimant's intellectual functioning."); *Luckey v. United States Dep't of Health & Human Servs.*, 890 F.2d 666, 668 (4th Cir. 1989) (noting prior recognition of the court that the absence of an IQ test during a claimant's developmental years does not preclude a finding of mental retardation prior to age twenty-two and that "in the absence of any evidence of a change in a claimant's intelligence functioning, it must be assumed that the claimant's IQ had remained relatively constant.") (citing *Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985)).

Finally, plaintiff argues that she also meets the second prong of listing 12.05C. Pursuant

to Ninth Circuit law, "an impairment imposes a significant work-related limitation of function when its effect on a claimant's ability to perform basic work activities is more than slight or minimal." *Fanning*, 827 F.2d at 633 (adopting this standard as established by other circuit courts) (cited cases omitted). A step two severity finding is not necessary to satisfy this standard. *Id*. at n.3 (citing *Edwards by Edwards v. Heckle*, 755 F.2d 1513, 1515 (11th Cir. 1985) ("significant" work-related limitation of function involves something more than "minimal" but less than "severe")). Plaintiff notes that, in this case, both ALJs found numerous severe impairments and deemed her capable of performing light work. (*See* AR 16, 19 (finding plaintiff's depressive disorder, cervical disc disease, borderline intelligence, hepatitis C, and status post herniorrhaphy severe "given their affect on her ability to engage in work activities[,]" and assessing moderate difficulties in maintaining social functioning; limiting plaintiff to light work, including "simple repetitive tasks that do not require written instructions and [with] minimal contact with coworkers."); AR 26-27, 30 (finding plaintiff's chronic neck and back pain, borderline intelligence, depression, and hepatitis C severe and assessing, *inter alia*, moderate difficulties in maintaining concentration, persistence, and pace; limiting plaining to light work, "diminished by non-exertional limitations which make it impossible for her to concentrate on and attend to complex work tasks[]" and finding her limited to "simple repetitive work shown by demonstration and not requiring written instructions . . . [with] minimal contact with coworkers[.]")) Plaintiff asserts that, accordingly, she has established a more than slight or minimal effect on significant work-related limitation of function.

The Commissioner points to Social Security policy as supporting its request for further administrative proceedings. The applicable policy states in relevant part:

> If a file contains the results of several versions of the same test, such factor as currency of the evaluation, claimant's age at time of evaluation, adequacy of claimant and evaluator motivation, and completeness of the administration and report must also be weighed in the decision as to which of several IQ's from different revisions of the same measure will be determinative. . . . Adequate resolution of the issues posed by specific cases may require professional consultation with a clinical psychologist or psychiatrist trained in intelligence test administration and interpretation. At the hearing level, the testimony of a medical or psychological advisor or vocational expert may be required.

Social Security Administration Program Operations Manual System (POMS) DI 24515.055. The Commissioner describes the Ninth Circuit's decision in *Fanning* as suggesting the adoption of the lower of several valid IQ scores, but asserts that remand is nevertheless the appropriate remedy in such circumstances. *See* 827 F.2d at 633-34 (remanding where ALJ did not render any findings as to whether any of alleged impairments had a more than slight or minimal effect on ability to perform work activities). Although it is not entirely clear, the Commissioner appears to argue that the 2001 IQ score from Dr. Czysz did not stem from a valid IQ test as required by listing 12.05C. (*See* AR 157 (Dr. Czysz described the 2001 results as stemming from an "Abbreviated" test.)) He asserts the need for a medical expert to assist the ALJ in evaluating the 1997 and 2002 test results.

The Commissioner also concedes error with respect to the prefatory requirements of listing 12.05, noting plaintiff's eighth grade special education and inability to read and write beyond a first or second grade level. (*See* AR 137, 157, 174.) Additionally, the Commissioner asserts that the ALJ erred in failing to assess whether plaintiff's restriction to less than a full range of light work satisfied the second prong of listing 12.05C, asserting that the Ninth Circuit has held that the second prong may be satisfied where a claimant is limited to light or sedentary work. *See Fanning*, 827 F.2d at 633 (citing the decision in *Mowery v. Heckler*, 771 F.2d 966, 973 (6th Cir.

1985), which held second prong of 12.5C was satisfied where claimant was limited to light or sedentary work).

Given the above, the Commissioner essentially concedes that the record contains sufficient evidence to show that plaintiff meets both the preliminary requirements of listing 12.05 (based on her educational history and limited reading and writing ability) and the second prong of part C of that listing (based on the limitation to light work). The Court agrees that the record supports such a conclusion. The only question, therefore, is whether the lower, 2002 IQ score should control and demonstrate plaintiff's satisfaction of the first prong of listing 12.05C.

The POMS provision relied on by the Commissioner "does not have the force of law, but . . . is persuasive authority." *Warre v. Commissioner of the Soc. Sec. Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006). In this case, the Court is not convinced the Commissioner should be given the opportunity for further consideration of listing 12.05C. Disregarding the POMS provision, case law supports the adoption of the lower of two separate IQ test scores. *See, e.g.*, *Fanning*, 827 F.2d at 633; *Ray*, 934 F. Supp. at 350. Moreover, the Court agrees with plaintiff both that the activities and abilities relied on by the ALJ in rejecting the lower IQ score are not inconsistent with a finding of mental retardation, and that the ALJ's reliance on her work history is suspect. With respect to the latter, it should be noted that plaintiff's highest earnings by far were $4414.26 in 1990 and $3160.04 in 1991. (AR 71.) Also, even if the 2001 test is not valid in and of itself, it does corroborate the results from Dr. Czysz's 2002 test. For these reasons, the Court concludes that it is clear from the record that the ALJ would be required to find plaintiff disabled pursuant to listing 12.05C and that, therefore, she is entitled to an award of benefits.

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Credibility and Associated Arguments

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, ALJ Dethloff assessed plaintiff's credibility as follows:

> In determining the claimant's residual functional capacity, I also considered her subjective allegations and found them not credible given the objective medical record of evidence.
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> Although the claimant alleges she cannot work due to her impairments, the record shows that her alleged inability to work stems entirely from her drug addiction and alcoholism. On October 15, 2002, the claimant reported, "her use of drugs and alcohol prevented her from employment success, due to hangovers from alcohol and cocaine, which resulted in an inability to attend work and/or reduced job performance and productivity." The claimant also reported that she has used her disability checks to purchase cocaine in the past.

> Although the claimant reported being clean and sober since May 2002, she has a significant relapse history. The claimant has reported throughout the record that the longest that she has been sober in the past 25 years has been for one and one-half years. While sober, the claimant was able to manage her funds and take care of her needs. As to the issue of current sobriety, this is doubtful, absent corroboration over time. Compare, Kellar v. Rowen, 848 F.2d 121, 124 (9[th] Cir. 1988).
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> Despite her alleged impairments, the record shows that the claimant has the ability to engage in daily activities. For instance, the claimant perform [stet] household chores; self-groom; prepare meals; attend church and narcotics anonymous meetings; take public transportation; socialize appropriately with the manager of her apartment complex; listen to the radio; and watch television. The fact that she engages in these daily activities indicates that she has the capacity to perform work activities despite her allegations that she cannot work.
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> Although the claimant alleges that she cannot read or write, she demonstrated that she could perform basic arithmetic to the extent that she could pay rent, manage her money, and purchase food. Additionally, the claimant was able to follow a three-step command upon examination and request help in completing necessary paperwork for enrollment in drug and alcohol treatment. I find that the claimant is not credible because her subjective allegations are not supported by the objective signs and clinical findings in the record.

(AR 19 (internal citations to record omitted.)) (*See also* AR 29, 31 (ALJ Nichols found plaintiff not entirely credible "in light of the reports of the treating and examining practitioners, the findings made on examination, and the claimant's own description of her activities and life style.")).

Plaintiff argues that the ALJ failed to properly consider her complaints of pain. She points to Social Security Ruling (SSR) 96-7p, as requiring the ALJ to, first, "consider whether there is an underlying medically determinable physical or mental impairment . . . that could reasonably be expected to produce the individual's pain or other symptoms[,]" and, second, to "evaluate the intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Plaintiff further notes that, under Ninth Circuit law, "once the claimant produces objective medical evidence of an

underlying impairment, an adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective medical evidence to fully corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). Plaintiff avers that ALJ Dethloff rejects or ignores evidence of her pain, including opinions from physicians Drs. W.P. Fleet and Brian Miller, the testimony of her case manager, Eileen Laiche, as well as her own testimony of her pain. (*See* AR 278-79 (Dr. Fleet found plaintiff unable to lift at least two pounds, to stand and/or walk, and to work due to "very severe spinal cord encroachment with nerve damage"), AR 412-13 (Dr. Miller noted plaintiff's "multiple pain complaints in her upper extremities are more consistent with a more proximal cause, such as, her spine."), AR 441-48 (plaintiff's testimony regarding her back and neck pain and tendonitis); AR 463 (Laiche testified: "But I can see that she's in pain. She has progressively had a more stiff skeleton movement, and . . . when she sifts [stet] in her chair and she's wincing, various non-verbal ways of letting me know - - or I can see that she's in pain."; "[I]t's a very stiff posture, and it's hard for her to turn her neck because the back hurts so much.")) Plaintiff maintains that the ALJ failed to consider whether her pain could reasonably result from her conditions, failed to assess the limiting effects of her pain, failed to make specific findings supporting his conclusions, and erred in rejecting her pain complaints based solely on a lack of corroborating medical evidence. She asserts that, at a minimum, her claim must be remanded for further development on the issue of her pain.

The Commissioner concedes without elaboration that some of the reasons given for the ALJ's assessment are supported by the record, while others are not. The Commissioner agrees that the case should be remanded for further consideration of this issue, but asserts no basis for crediting plaintiff's testimony as true. *See, e.g.*, *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.

2003) (courts retain flexibility in applying the "'crediting as true' theory"; remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true).

The Commissioner also acknowledges specific errors, asserting that the ALJ erred in failing to evaluate the opinion of Dr. Miller and in his consideration of Laiche's testimony. The ALJ rejected Laiche's testimony upon concluding that she was not qualified as an expert and that her testimony was "merely cumulative because there is no significant demonstrated factual change in the claimant's mental functioning" since the unfavorable 2002 decision. (AR 19.) The Commissioner notes, however, that Laiche merely offered lay observations of plaintiff's physical movements and apparent pain, as well as her reading, writing, and emotional difficulties. (*See* AR 461-63.) He asserts the need for remand to allow the ALJ to consider the opinions of Dr. Miller and the testimony of Laiche.

The Commissioner does not concede error with respect to Dr. Fleet. The ALJ accorded no weight to Dr. Fleet's opinion that plaintiff was unable to lift at least two pounds, to stand and/or walk, and work due to "'very severe spinal cord encroachment with nerve damage'[,] . . . because his characterization that the claimant has severe spinal stenosis is grossly exaggerated given the MRI results showing only moderate stenosis and mild cord atrophy without associated abnormal enhancement or cord signal; cervical myelogram, which showed mild mid cervical spondylosis and loss of normal cervical lordosis; and neurological examination, which showed no significant pain with palpation of the spine." (AR 18 (internal citations to record omitted.)) The Commissioner asserts that the ALJ provided sufficient reasons for rejecting this physician's opinions. *See Lester*, 81 F.3d at 830-31 (where not contradicted by another physician, a treating

or examining physician's opinion may be rejected only for "'clear and convincing'" reasons; where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing.") (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991) and *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983) respectively). *See also Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) ("[W]hen evaluating conflicting medical opinions, an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings.")

The ALJ did not reject plaintiff's complaints of pain based solely on a lack of corroborating medical evidence. Moreover, it should be noted that medical evidence is "still a relevant factor in determining the severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). In addition, evidence regarding a plaintiff's daily activities may be considered by the ALJ in finding that a plaintiff's subjective pain testimony is not credible. *Id.* If anything, in this case, the ALJ should have more directly discussed plaintiff's complaints of pain in his credibility assessment.

As asserted by the Commissioner, the ALJ failed to address the evidence from Dr. Miller and wrongly construed Laiche's testimony as proffering a medial opinion. With respect to the latter, lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence, *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996), and an ALJ can reject such testimony only upon giving reasons germane to each witness, *see Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual

who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so.")

As for Dr. Fleet, the Court agrees with the Commissioner that the ALJ provided sufficient reasons for rejecting the opinions of this physician. Moreover, the Court further agrees that there is not a sufficient basis for crediting plaintiff's testimony as true. That is, the ALJ did provide some legitimate reasons for finding plaintiff not credible, including the impact of her drug and alcohol history on her past attempts to work, and the conflict between her alleged level of impairment and her activities and demonstrated abilities. (*See* AR 19.)

In sum, if the Court were to have found further administrative proceedings necessary in this case at step three, the ALJ should have also been directed to reconsider plaintiff's credibility. Specifically, the Court would have directed the ALJ to address plaintiff's complaints of pain in accordance with SSR 96-7p, consider the evidence from Dr. Miller, and discuss Laiche's testimony as given from the perspective of a lay witness.

Past Relevant Work

Past relevant work is work (1) performed within the past fifteen years, (2) constituting substantial gainful activity (SGA), and (3) lasting long enough for the individual to have learned how to perform the work. 20 C.F.R. §§ 416.960(b)(1), 416.965(a). If an individual worked only off-and-on for brief periods during the fifteen-year period, that work will generally not be considered past relevant work. 20 C.F.R. § 416.965. Also, average earnings of more than $500.00 per month ordinarily show that work is SGA, while average monthly earnings below

$300.00 generally show a claimant has not engaged in SGA. 20 C.F.R. § 416.974(b). However, earnings are a presumptive, not a conclusive sign of whether a job constitutes SGA. *Lewis*, 236 F.3d at 515. The presumption shifts the step-four burden from the claimant to the Commissioner. *Id*. To meet that burden, the ALJ must point to substantial evidence, aside from earnings, that a claimant has engaged in SGA. *Id*. at 515-16 (noting relevant factors pursuant to the regulations, including "the nature of the claimant's work, how well the claimant does the work, if the work is done under special conditions, if the claimant is selfemployed, and the amount of time the claimant spends at work.") (citing 20 C.F.R. §§ 404.1573, 416.973).

The Commissioner notes that plaintiff worked for approximately six to eight months in 1991, earning a total of $3,160.04, reported no income for the years 1992 through 1997, and earned a total of $1,652.37 in 1998. (AR 69, 71.) He asserts that, depending on whether plaintiff worked six or eight months, it is unclear whether her 1991 earnings where just at or below the $500.00 level creating a presumption of SGA. The Commissioner states that the ALJ offered no reasons for why plaintiff's past work qualified as SGA and did not employ the services of a vocational expert to clarify this issue. He avers that this matter should be remanded so that the ALJ may consult with a vocational expert on whether plaintiff has past relevant work. Plaintiff does not address this issue in her reply.

If the Court were to have found further administrative proceedings necessary at step three, the ALJ should have also been directed to consider whether plaintiff has past relevant work. However, this issue does not argue against an award of benefits and requires no further analysis.

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Transcript of the Record

Plaintiff argues that the Commissioner failed in his duty to provide a complete transcript of the record. *See* 42 U.S.C. § 405(g) ("As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.") She asserts that, while all of ALJ Dethloff's citations to the record are readily identifiable, some of ALJ Nichol's citations were either not identifiable or presumably not included in the record. She provides some examples in her brief. (*See* Dkt. 11 at 30.) Plaintiff argues that this issue put both her and the Court at a disadvantage with respect to this case. In response, the Commissioner asserts that this alleged error may support further proceedings, but not a payment of benefits.

Again, had further proceedings been necessary, the Court would have directed the Commissioner to ensure that the record is complete and, to the extent possible, ensure that all citations to the record in both ALJ decisions are identifiable. However, finding an award of benefits appropriate, this issue need not be further considered.

CONCLUSION

For the reasons set forth above, this matter should be REMANDED for an award of benefits.

DATED this 1st day of May, 2007.

Mary Alice Theiler
United States Magistrate Judge